

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

AT NASHVILLE, TENNESSEE

IN THE MATTER OF M.H.,)	
)	
)	
Petitioner)	
)	
)	
vs.)	Cause No. 04-70
)	
)	
)	
METROPOLITAN NASHVILLE)	
PUBLIC SCHOOLS,)	
)	
Respondent)	

ORDER

BY THE HONORABLE MICHAEL E. SPITZER,
Administrative Law Judge

A P P E A R A N C E S

For the Petitioner:

ALEX J. HURDER, ESQUIRE
Clinical Professor of Law
Vanderbilt University Law School
Nashville, Tennessee

Terri Lankford
Patty Stranch
Pursuant to T.R.A.P. 7, § 10.03
Vanderbilt Law Clinic
Nashville, Tennessee

For the Respondent:

MARY JOHNSTON, ESQUIRE
Asst. Metro Attorney
Metro Nashville Law Department
204 Metro Courthouse
Nashville, Tennessee

I. PROCEDURAL HISTORY

M.H. is a complex, but outgoing, 16-year-old student within the Metropolitan Nashville School System. He has had a difficult childhood and was a victim of neglect and sexual abuse. He has had extensive counseling and numerous psychological evaluations. As M.H. advanced through the grades, he became more intolerant of structure, and his inclination toward appropriate behavior declined.

M.H. has consistently scored below average on achievement tests throughout his scholastic career. As early as May 19, 2003, the Metropolitan Nashville Public schools Eligibility Report indicates that M.H. "meets the standards" for identification of ADHD. (Exhibit 2, page 165) This report further opines that M.H. has previously been diagnosed with ADHD and that he "demonstrates limited alertness resulting from ADHD. Consequently, he has difficulty with academic behaviors such as attending to instruction, organization and completing work." Id.

In addition to ADHD, M.H. has carried the additional diagnosis of Post Traumatic Stress Disorder (Exhibit 2, page 47) and Oppositional Defiant Disorder (Exhibit 2, page 5) for many years.

Based upon the history, evaluations, recommendations and comments from teachers, for M.H. an IEP team convened on October 22, 2003, and developed goals and objectives for M.H. based upon his identified eligibility of ADHD. The IEP team determined that appropriate accommodations included: modified grading scale; modified test format; abbreviated assignments; extra grade opportunities. The IEP team also decided that these accommodations should be made in all classes. M.H. was to receive special education 10 hours per week and general education 25 hours per week. (Exhibit 1, page 10)

The 2003-2004 school year did not go well for M.H. On February 25, 2004, M.H. was caught with drugs and, after a behavior manifestation hearing, he was suspended with Homebound Services. (Exhibit 2, page 369) Subsequently, the school system referred M.H. for additional evaluation within the system, and Terri Ashford, Licensed School Psychologist, conducted an evaluation on June 23, 2004. The referral apparently arose out of the parent's statements that the behavior, for which the zero tolerance violation occurred, was tied to M.H. being emotionally disturbed and a manifestation of that eligibility. The Ashford report did not make reference to ADHD, but

concluded "there appears to be no intellectually or psychologically-based disability consistent with regulations..." (Exhibit 1, page 92)

After the evaluation, proper notice was given, and an IEP team met on July 1, 2004. At this meeting it was determined that M.H. "does not meet the standards for any disability." (Exhibit 2, page 484) The parent disagreed.

This Due Process request follows in the footsteps of a prior hearing in September 2004 (See Transcript as Exhibit 3 to this hearing) The September hearing arose from the consequences of a zero tolerance violation and the parent disagreeing with the school system's subsequent IEP(referenced above) indicating that M.H. was no longer eligible for services. An additional issue was the outcome of the manifestation hearing. Id.

At the September 13, 2004, due process hearing there was some confusion as to whether or not the parent and her counsel had ever agreed that ADHD was no longer an issue. It had been ominously absent from the Ashford evaluation and was no longer established as an eligibility criterion for special education purposes. In his opening comments

to that hearing, the attorney for the parent stated: "I said that the ADHD was not an issue, not meaning that he did not have ADHD but that he needed to be tested for emotional disturbance and PTSD and it was a surprise to have the result come back that he no longer has ADHD either, from the... from the test because that was not one of the things that we had asked for. So, it seems to be a misunderstanding about whether, you know, what we agreed to at that meeting, although he's been treated for his PTSD, and being treated for PTSD, and we wanted that taken into account by the school system. We, we still do not agree that he does not have ADHD, but we would like to make the case that the PTSD is what is causing his very unusual behaviors." (Exhibit 3, page 32--Transcript of September hearing)

Therefore, at least to this Administrative Law Judge, it appears that the parent chose to pursue an eligibility of "emotionally disturbed" arising out of Post Traumatic Stress syndrome in her efforts to minimize the impact of a zero tolerance violation, and, at the same time, the school system took this opportunity to reevaluate and raise the possibility of deleting the historical eligibility criteria of ADHD.

That brings us to this hearing.

II. FACTUAL SETTING

M.H. has been identified as having ADHD by numerous professionals both within and outside the school setting. Dr. Churki Mohan Reddy, a pediatrician for M.H., diagnosed M.H. with ADHD and prescribed medication for treatment purposes. (Exhibit 6) This diagnosis and the medications prescribed are seen in his office notes as late as September 2003. Id.

Dr. Syed Bokhari, a medical doctor, who has been treating M.H. since September 2004, agreed that M.H. had a psychiatric diagnosis of ADHD, Post Traumatic Stress Disorder, and Oppositional Defiant Disorder. Dr. Bokhari stated that M.H.'s symptoms such as inattention and distractibility are consistent with ADHD. (TR, pages 19-21)

Dr. Joseph D. Labarbera, a psychologist at Vanderbilt Psychiatric Hospital, diagnosed M.H. as ADHD, major depressive disorder without psychotic features, PTSD and Oppositional Disorder. (Exhibit 1, page 130) Dr. Labarbera indicated that he relied on parent statements and teacher notes that he had reviewed as well as his own evaluations.

He further noted that the symptoms for ADHD have been in existence prior to the age of seven, which was evidenced by a kindergarten teacher's note who taught M.H. at age six. The note indicated that M.H. was a hyperactive child. (TR, pages 63-64)

Patricia W. Mitchell, Ph.D, an employee of the Department of Pupil Personnel Services, Division of Psychology for Metro Nashville Schools evaluated M.H. in the spring of 2002. The referral for evaluation was "due to learning and behavior problems." (Exhibit 2, page 175) At the time of the evaluation, M.H. had been diagnosed with ODD, ADHD and PSD. On a recognized behavior assessment index, Dr. Mitchell noted that M.H. was at risk for hyperactivity, learning problems, atypicality and withdrawal. In conclusion, Dr. Mitchell informed the school system that the evaluation indicated "high levels of maladaptive externalizing behaviors (i.e., overactivity, aggression, refusal to follow rules, resistance to adult authority) which occur in both home and school settings. Inattention, hyperactivity, poor persistence and impulsivity were consistently identified as prominent features of M.H.'s behavior which interfere with success in academic endeavors as well as in the home and community." (Exhibit 2, page

181) Further, Dr. Mitchell opined that "test data and developmental history are consistent with a diagnosis of attention deficit disorder." (Exhibit 2, page 182)

Victoria Hampton, a Consulting Special Education Teacher for Hunter's Lane cluster for Metro Nashville Schools, performed 30 minutes of class observation of M.H. on February 3, 2005. Ms. Hampton opined that based upon her experience in education such behaviors as "talking, being tardy, disrespectful, not following directions . . ." are "indicative of a student that was exhibiting ADHD." (TR, page 107) During Ms. Hampton's observations, she found that M.H. "sat in the front of the class directly in front of the student teacher" and "did not talk out, get out of his seat, or fidget." (Exhibit 1, page 74) However, Ms. Hampton also noted that she could "have missed something" because she did not observe M.H.'s behavior during the whole period of the classes. (TR, page 116) Furthermore, Ms. Hampton testified that, based on the observation forms that M.H.'s teachers provided to her, M.H. was frequently talking out in class, showed short attention spans, which always caused disruptions in classroom. (TR, pages 116-20)

Lisa Baker Velarde, a special education teacher, is M.H.'s language-ex program teacher. (TR, page 141) On her class observation forms, Ms. Velarde indicated that M.H. frequently talked out in class, sometimes talked entire blocks or sang to himself, did very little work or failed to complete any work at all, was disrespectful or talked back, and did not follow directions. (Exhibit 1, pages 70-73) However, she testified that M.H. behavior was normal. (TR, page 146) Ms. Velarde also noted that M.H. was an "excellent student," (TR, page 144), who was good with Language Exclamation Point work. She further stated that, in her class, M.H. was working on third and fourth grade levels. (TR, page 179)

Kevin Andrew Yancy, a general education teacher, is M.H.'s Math Foundation teacher. (TR, page 108). On his class observation forms, Mr. Yancy indicated that M.H. was frequently tardy, had short attention span, always talked out or did not follow directions, which always resulted in a need to redirect M.H. "to get back to task or follow the rules." (Exhibit 1, pages 67-69) In fact, Mr. Yancy considered a week with M.H. talking out only nine times to be "a good week." (TR, page 184) Moreover, Mr. Yancy testified that M.H. always exhibited problem behavior "when

[Mr. Yancy] ma[de] a request to perform a task." (TR, page 186-87) However, MR. Yancy concluded that M.H.'s exhibited behavior of a "typical teenager." (TR, page 192)

Chip Sullivan, a teacher and a coach of Hunter's Lane High School, is M.H.'s Physical Education teacher. On his class observation forms, Mr. Sullivan indicated that M.H. did not show any behavioral problems in his classes, was never tardy and enjoyed the class very much (Exhibit 1, pages 59-63).

Terri Ashford, M.A., a Licensed School Psychologist for Metro Schools, evaluated M.H. on June 23, 2004. (Exhibit 1, pages 83-93) The reason for evaluation was "academic and social emotional post traumatic stress syndrome with depression." (TR, page 221) In the report, Ms. Ashford did not address ADHD, but concluded that "there appears to be no intellectually or psychologically based disability." (Exhibit 1, page 92) However, she suggested that M.H. would need to have structured activities with frequent breaks, to have an option to move to a quiet place when feeling loss of control, to use carrels or dividers to screen out distractions, to supplement written direction with verbal directions, and to state specific expectations before each

activity. (Exhibit 1, page 93) Further, Ms. Ashford explained that she did not speak to any of M.H.'s teachers who found him to be eligible for ADHD in the Eligibility Report. M.H. was to be reevaluated to ADHD on May 19, 2006. (TR, pages 261-63)

III. ISSUES

1. Whether M.H. meets the criteria for a diagnosis of ADHD
2. Whether M.H. requires special education services due to a diagnosis of ADHD.

IV. ARGUMENT

The purpose of the Individuals with Disabilities Education Act (IDEA) is to guarantee children with disabilities a free appropriate public education (FAPE) 20 U.S.C. 1400 et seq. Renner v. Board of Education 185 f.3d 635, 644 (6TH Cir. 1999). When accepting Federal funds for implementation of the parameters of IDEA, the various states are required to identify, locate, evaluate, and appropriately place all disabled children who reside within their district. 20 U.S.C 1412(2)(c). Evaluations and placement in an appropriate program are an affirmative duty upon systems. 20 U.S.C. 1414 (1)(A).

As to the placement of M.H. within the Metropolitan School System, there is no issue in this case. However, if M.H. is such an excellent student working on third and fourth grade material, possibly the school system should enhance the goals and objectives for M.H.

Here the issue rests squarely on the strength of the evaluations and observations for identification and eligibility purposes.

IDEA provides an inherent right to a reliable evaluation and placement. Tests, evaluations, and observations must be tailored to fit the need of the students. C.F.R. 300.5332.(b). For the identification of ADHD, information for eligibility must be gathered from the parent, general education classroom teacher, licensed physician, special education teacher and other professional personnel. CRR of Tenn. Chapter 0520-1-9-01(4)

If the parent disagrees with an educational plan or the removal of a child from the eligibility criteria, the parent can seek relief. IDEA provides a process, which begins with a complaint or statement of disagreement made

to the school district, followed by a due process hearing request. At the conclusion of the Due Process Hearing, either party may appeal.

In the case at hand, the child was receiving special education services under the eligibility code: ADHD. This eligibility was removed when the school system deemed that the student did not meet the criteria for ADHD eligibility.

ADHD is not a specific disabling condition under the IDEA. However, a student, such as M.H. may be eligible for special education services under the category of "other health impaired".

As a category for falling within the parameters of special education funding, "Other Health Impaired" means having "limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that--- (i) is due to ...attention deficit hyperactivity disorder; and (ii) adversely affects a child's educational performance." 34 CFR300.7 (c)(9)

ADHD is also a condition that may create eligibility under Section 504 if the disorder substantially interferes with a major life activity such as learning or effectively participating in school activities.

State Board of Education Rule 0520-1-9-01(2) provides eligibility standards for an "Other Health Impaired" child when that impairment results in chronic or acute health problems that indicate a need for special education services. These eligibility standards, which must cause an adverse affect on educational performance in the general education classroom or learning environment, are as follows:

1. impaired organizational or work skills;
2. inability to manage or complete tasks
3. difficulty interacting with others;
4. excessive health related absenteeism; or
5. medications that affect cognitive functioning.

The State rules and regulations give further guidance by stating that when determining eligibility, the system must include the following evaluation criteria:

1. Medical evaluation from a licensed physician, which includes the diagnosis and prognosis of the impairment; information regarding medications; and any special health care procedures; and

2. Additional assessments, which indicate that the health impairment causes deficiency in academic functioning; adaptive behavior; social/emotional development; and motor or communication skills.

(Rules and Regs of Tenn. Chapter 0520-1-9-01)

The Metropolitan Nashville School System further utilizes a special education manual, which breaks down each of the eligibility standards into identifiable criteria for evaluation purposes. For example, some of the criteria the system requires for identification are:

1. Impaired organizational or work skills: inability to systematically plan for the completion of upcoming projects or assignments; inability to complete a task in a timely manner.

2. Inability to manage or complete tasks: unable to manage or complete the assigned task(s) even after guidance is given due to excessive distractibility; excessive activity levels that interfere with his/her

ability to consistently work on a task; difficulty maintaining a focused level of attention to the task(s)

3. Difficulty interacting with others: difficulty that may arise from impulsive behaviors that are seen as dangerous; an excessive level of activity that is perceived as overstimulation/ overexcitability.

(Exhibit 1, pages 97-99)

CONCLUSION AND ORDER

A group of professionals for the Metropolitan Nashville School System have met, reviewed evaluations, classroom observations, psychological testing, physician diagnosis, and academic historical indices and have come to the conclusion that M.H. no longer qualifies for special education benefits. Although it is not specifically mentioned, the system must take the position that M.H. was initially misdiagnosed by the system because his other health impaired eligibility arising out of ADHD is no longer evident to them. Otherwise the system could conclude that M.H. is ADHD, but he does not require special education services. It is apparent that the system chose their path when the June 1, 2004 IEP listed no disability.

The parent is convinced that ADHD exists and continues to have M.H. treated at Vanderbilt Psychiatric Hospital for ADHD with medications plus Post Traumatic Stress Disorder and Oppositional Defiant Disorder. Further the parent is convinced that the system should provide accommodations for M.H. who is several years behind in his grades, even though he has been shown to have ability to reach goals and objectives of his past IEP's.

It appears from the procedural history of this case that the school system had no problem identifying M.H. as eligible for services until his behavior violations escalated to the point of a zero tolerance violation. One would have to ask, what aspect of the zero tolerance behavior initiated a panacea for historical ADHD characteristics and eligibility.

All parties to this litigation acknowledge that ADHD is characterized by a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequently displayed and more severe than is typically observed in individuals at a comparable level of development. Both parties recognize that it is important to view some symptoms prior to age seven and the symptoms must be viewed in more than

one setting. Both parties further agree that ADHD individuals have difficulty sustaining attention to tasks; fail to listen appropriately; have difficulty organizing tasks; dislike tasks that take time and mental effort; they are easily distracted by irrelevant stimuli; are easily distracted; refuse or fail to listen to others; fail to follow rules; they are found to be talking excessively; they are often impatient; have difficulty in awaiting one's turn; often make comments out of turn; fail to listen to directions ; they initiate conversations out of turn; engage in dangerous activities without consideration of the consequences; and signs of the disorder may be minimal or absent in settings that are structured or particularly interesting to the individual. (Exhibit 1, pages 100-102)

According to several observations, M.H. has revealed ADHD symptoms in more than one setting. After M.H. had been diagnosed with ADHD by his pediatrician and the school psychologist, Dr. Bokhari and Dr. Labarbera confirmed that diagnosis and concluded that M.H.'s inattention, distractibility, and hyperactivity were consistent with ADHD. Furthermore, Dr. Mitchell observed that M.H.'s overactivity, aggression, refusal to follow rules, and resistance to adult authority occurred in both home and

school setting, which was consistent with ADHD. Symptoms were also noted by M.H.'s teachers when M.H. was confined to time consuming tasks that were not of any interest to M.H. In such settings, M.H. would frequently talk out in class or sing to himself, have short attention spans, be tardy, be disrespectful, refuse to follow directions or complete required tasks, which always resulted in a need of his teachers to redirect M.H. to follow the rules or complete the tasks. However, in settings of particular interest to M.H., like physical education classes, M.H. would not display any of those symptoms, which is consistent with the characteristics of ADHD upon which all parties agreed.

Therefore, upon the facts and proof presented in this case, it is hereby ORDERED that:

1. M.H. has been properly diagnosed as ADHD and is eligible for services for students with disabilities under IDEA, and

2. The ADHD of M.H. is of such a nature that it adversely affects his educational performance. M.H. requires special education accommodations (IEP) in order to

allow him to benefit from the general education and receive
FAPE provided by the Metropolitan Nashville School System.

MICHAEL E. SPITZER
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that he has sent a true and correct copy of the foregoing to the HON. ALEX J. HURDER, Attorney at Law, Vanderbilt Legal Clinic, 131 21st Avenue South, Nashville, TN 37203, and the HON. MARY JOHNSTON, Attorney at Law, Metropolitan Government, 430 Third Avenue North, Third Floor, Nashville, TN 37201, and Mr. Bill Ward, Tennessee Department of Education, Andrew Johnson Tower, 5th Floor, 710 James Robertson Parkway, Nashville, Tennessee, 37234-0380, by placing the same in the United States mail, addressed as aforesaid, with sufficient postage attached thereto to carry the same to its destination, on this _____ day of March 2005.

MICHAEL E. SPITZER
Administrative Law Judge

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a Proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.